

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

FEB 16, 1995

John Moore, Esq.  
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Washington, D.C. 20036

Dear Mr. Moore:

You have requested, on behalf of your client Horsehead Resource Development Company ("Horsehead" or "HRD"), that EPA issue administrative stay of the August 24, 1994 final rule that effectively prohibited use of the slag derived from high temperature metal recovery of hazardous waste K061, K062, and F006 as an anti-skid/deicing agent. (59 FR 43496.) That rule takes effect on February 24 of this year. EPA has reviewed your petition carefully but disagrees that the rule should be stayed. Our reasons are set out below.

Your petition makes three principal arguments. First, you maintain that the final rule is defective because any findings of risk associated with use of the anti-skid material are insufficiently documented to justify the prohibition on use. Second, you indicate that the Agency's recent proposal to allow anti-skid (and other uses) of the slag indicates that the final rule is arbitrary, or at least premature. You then argue that Horsehead is suffering irreparable injury as a result of the de facto prohibition. Our responses to each of these points follow below.

1. The final rule stated that EPA had no immediately ascertainable means of determining that K061 and other hazardous wastes are treated so that "short-term and long-term threats to human health and the environment are minimized" (RCRA section 3004(m)) when residues from those wastes are used as anti-skid material. 59 FR 43499 (August 24, 1994). Since these residues may contain relatively high concentrations of toxic metals (including lead levels between .1 and .5%), and are placed into the environment in an essentially uncontrolled manner, the possibility of exposure to human and environmental receptors is high. 59 FR at 8584 (Feb. 23, 1994). Likely exposure pathways include inhalation of particulates released to the air, ingestion of contaminated water, and ingestion or inhalation of contaminated soils. *Id.* <sup>1/</sup> In this regard, the statute commands EPA, in determining whether hazardous wastes should be prohibited from land disposal,

<sup>1/</sup> A number of commenters during the rulemaking voiced these same concerns. See 59 FR at 43498/1.

to take into account “the long-term uncertainties associated with land disposal” (see, e.g. RCRA section 3004 (d) (1) (A)). Commenters likewise were unable to supply any of the needed information, despite repeated requests from EPA dating back at least to 1991. See 59 FR at 8584; 59 FR at 43498; Response to Comment Background Document at 4, 9, 20, 21; and 56 FR 41172).

EPA consequently does not regard the proposed rule as impermissible “speculative”, or otherwise arbitrary, as you assert. Petition pp. 15-6. The land ban provisions command that hazardous wastes (including hazardous waste treatment residues) must be prohibited from land disposal unless treatment has minimized threats to human health and the environment. Neither EPA nor any commenter could show that threats from the anti-skid used have been minimized. EPA thus believes that the de facto prohibition in the final rule is required as a matter of law.

2. Your second point relates to the Agency’s recent proposal to allow anti-skid and other uses of these same treatment residues. This proposal, of course, is only that. Until the Agency is able to review and evaluate public comments and make a final decision, it is not a final action. I consequently do not believe that EPA has somehow repudiated the final rule.

A number of commenters already have state concerns about the slag characterization data, exposure assumptions, and risk evaluation methodology utilized by the Agency for the proposed rule that call into question the proposed conclusions. Among the issues raised are whether EPA should take into account an exposure pathway consisting of tracking of particulate from the ground-deposited slags into dwellings, the basis for the dilution and attenuation assumptions made in the risk assessment for the proposed rule (with particular regard to unencapsulated uses), and whether the proposed risk analysis is consistent with the methodology used by EPA at a number of Superfund sites. Additional issues include whether additional analysis of the slag’s ability to withstand long term weathering or abrading forces (a particular concern for unencapsulated uses) is needed, and whether uses should be limited to situations where the slags meet some type of relevant commercial specification (such as size, shape, compressive strength, or abrasion) to assure both that the material will be used only in manners allowed by a rule and that the material will continue to be environmentally stable over time. Concerns also have been raised that quarterly composite sampling does not adequately characterize metal levels in the slags, and that some other type of sampling regime should be utilized. Information bearing on these issues is available in the docket to the proposed rule.

Although EPA obviously has not fully evaluated this new information, we think it merits serious consideration and intend to solicit public comment on it. It is clear that it is premature to draw any conclusion regarding the outcome of the

proposed rule. It is also improper to assume that the proposal repudiates the final rule.<sup>2</sup> EPA consequently does not accept HRD's position that it should stay the final rule because it has issued this proposal.

3. EPA also does not accept Horsehead's assertion that it will suffer irreparable harm as a result of the final rule. EPA found that anti-skid disposition of the slag likely accounts for less than 15% of total slag use, and that the company has available to it other non-landfill dispositions that can accommodate all of its slag. 59 FR at 8585 (indicating that this information was supplied to EPA by HRD itself); Response to Comment Background Document, p. 8. (These other dispositions involve encapsulation of the material, and thus should pose less risk than the unencapsulated placement as anti-skid material. *Id.*) Consequently, since the final rule will not force HRD to landfill any slag, we fail to see how the company is facing irreparable injury.

You also refer to the final rule as having an adverse "stigmatizing" effect. Pet. p. 22. It is not clear whether such asserted "stigma" is even a cognizable basis for a decision. See Hazardous Waste Treatment Council v. EPA, 861 F. 2d. 270, 274-77 (D.C. Cir. 1988) (potential stigma of RCRA listing decision cannot be taken into account in determining whether or not to list). Second, as EPA pointed out, the Pennsylvania Department of Transportation determined independently of the rulemaking (and indeed, before the rulemaking commenced) that it would not use K061 slag as anti-skid material on interstates or limited access highways due to concern about adverse environmental effects. Response to Comment Background Document, p. 13. HRD also announced, again independently of the rulemaking, that it would discontinue supplying the material to a number of communities where citizens' groups had voiced concern about adverse environmental consequences of disposition of the slag as anti-skid material. *Id.* p. 12. In light of these facts, EPA does not believe it proper to attribute "irrevocable harm" to the rulemaking action.

EPA consequently does not intend to stay the final rule. We do, however, hope to continue working with HRD on these issues and hope to have the company's continued cooperation in completing the rulemaking.

Sincerely,

Michael Shapiro, Director  
Office of Solid Waste